On the status of the System of Rights

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Summary. In this paper I want to show that Habermas's theory can be interpreted as an attempt to indicate how modern freedom and equality should be realized socially. His starting point therefore lies in the liberal tradition. In the first section I consider how Habermas developed his conception of modern freedom and equality as a criticism of Kant and Weber, from which it can be seen that he reverts to some elements of traditional society. How Habermas elaborates this conception of freedom as a criticism of Kant is dealt with in Section II. The implications of this conception for moral action are discussed in Section III. Subsequently, Section IV examines how moral action is related to the system of rights. Finally, Section V discusses the status of the system of rights.

1 The legitimacy of a free and equal law of citizens

Like Weber, Habermas considers an association of free and equal consociates under law to be the basis of the legal community. (F&G, 217) But, in contrast to Weber, Habermas feels this does not imply that law and morality must be separated. In his view, the relationship between law and morality is complementary (*Ergänzungsverhältnis*). To make clear what he means by this, it is necessary to examine more closely the position of Weber and the criticism of this position as formulated by Habermas. Insofar as Weber maintains that law should be separated from morality, he is situated in the tradition of legal positivism. The legitimacy of the law, according to Weber, cannot be measured by any moral truth, explicit or implicit. This does not mean, however, that Weber wants to do away entirely with the difference between legitimate and illegitimate law. In his view, legitimate law still coincides with rational law. What is essential is that he gives the term 'rational' a totally new content. In his view, rationality in this context must not be bound to the moral truth of practical reason, but to the form of law. Rational, i.e. legitimate, law is identified by Weber with formal law (R&M, 51), for which traditional civil law can be a model.

Weber's conception of law is centred on the interpretation of law in modern society. To understand its specific meaning, it is useful to contrast his view with a definition of law that is more typical of traditional societies (for example, the polis in Ancient

Greece). Five characteristics typical of law in traditional societies are relevant in this context:
1. As expressions of a divine or cosmic order, morality and law are inextricably bound up with each other;
2. The cosmic order that law refers to is a reasonable order;
3. Law is legitimate because it refers to the reasonable order just mentioned;
4. Law is part of a comprehensive traditional whole;
5. Law is not compatible with modern (subjective) freedom and equality.

Weber's conception of law is mainly an attempt to determine it in accordance with modern, subjective freedom. When property law is taken as an example, it can be established that the legal subjects within the law are free as well as equal. As an owner, any legal subject differs in no way from another: all are equal. Moreover, they are entitled and free to dispose of their property as they see fit. With freedom and equality as its central elements, Weber's conception of law distinguishes itself from traditional law in each of the five aforementioned features:
1. Law and morality are not interrelated;
2. Rationality is interpreted purely formally and is, thus, disconnected from substantial cosmic reason;
3. Legitimacy is bound to formal rationality;
4. Legitimacy and tradition are diametrically opposed to one another;
5. Law makes room for modern (subjective) freedom and equality.

Compared to the traditional characteristics, Weber's concept of law is formalized: he disconnects it from a substantive definition of morality, from a substantive rationality, and an equally substantive definition of tradition. Thus, legal capacity can be taken purely formally, and free rein is given to subjective freedom, an individual view of morality, purposivity in action, and to social position. By definition, a formally defined law cannot borrow its legitimacy from the content of law. Hence, only one possiblity remains open: legitimation by the form of law, legitimacy by legality. This concept of legitimacy was the basis of Weber's repudiation of the so-called "materialization" of law (R&M, 52), the attempt to make certain politically and socially desirable ends the finalities of law itself. Thus, for example, everybody has the right to look after his health in his own way. But it is not the task of law to guarantee health care that is adapted to every individual need. The materiality of law, according to Weber, contradicts its rationality. Consequently, it is a threat to subjective freedom.

Habermas criticizes Weber for disconnecting the legitimacy of law from morality. (R&M, 61) This raises two questions. First, which arguments can Habermas use against Weber? If Weber simply disconnected legitimacy from morality in order to make room within law for subjective freedom, does not Habermas thereby necessarily oppose subjective freedom and formal equality?

Habermas elaborates his criticism of Weber by showing that a closer analysis of what the latter defines as rationality leads to the conclusion that it is not this rationality itself that has legitimating value, but specific norms that Weber implicitly connects with it.

Referring to formal law, Weber distinguishes three meanings of rationality:

1. Formal law consists of fixed rules that guarantee certain liberties and protect property. In that sense it offers legal security. (R&M, 56/58) Habermas's objection is that legal security is a specific value that has to be compared to other values. When, for instance, the environment is at stake, it may be necessary to limit certain liberties, thereby diminishing legal security. Thus, the legitimating force of legal security is dependent on its relation to other values.
2. Formal law has an openness that allows for subjective freedom. (R&M, 57/59) Here Habermas remarks that it is not the formal openness as such that guarantees subjective freedom. This is only true inasmuch as subjects also possess and maintain equal opportunities for actually making use of this openness. Therefore, formal law has a legitimating force only insofar as it contributes to securing the freedom and equality of the subjects. This is dependant on a substantive norm: the freedom and equality of legal subjects should be the actual telos.
3. Formal law has been elaborated as a systematic, coherent, well-ordered system of rights and duties, and as such is an expression of scientific rationality. (R&M, 57/60) According to Habermas, formal law cannot derive its legitimacy only from this. The systematization made clear that the law derives its unity from certain principles of right. The legitimacy of law dependens, therefore, on the legitimacy of these principles.

Habermas concludes that the legitimating forces to which Weber appeals remain external to the formal rationality of law, in the Weberian sense. (R&M, 61) However, this conclusion can be further specified by combining the three normative elements which, according to Habermas, underlie the three aspects of rationality distinguished by Weber. He translates the substantive norm developed with reference to the second aspect of rationality into the two principles that should be applied for all law and made explicit in the same way. (R&M, 59/60) These two principles (freedom and equality as the telos of the legal subject) can also be interpreted as a more concrete elaboration of those normative elements that Habermas puts at the top of the first and third aspects of rationality. For, beginning with the third aspect, they are principles from which a jurisdiction can derive its unity. Moreover, these principles can apply as examples of "other values" to which the value of legal security must be related. As an example of these other values, Habermas himself suggests "welfare state policies that can only be realized with the help of blanket clauses and open legal concepts". (TL, 225) This example is part of the same domain as the two principles of law mentioned earlier: What is at stake is the effective possibility of realizing freedom and equality as opposed to a formal freedom and

equality (satisfied by the value of legal security). I doubt whether it is possible to give examples of values drawn from another domain. If this doubt is justified, and if it is assumed that the two principles mentioned are eminently the principles from which the legal system derives its coherence (for what other principles could be mentioned?), then Habermas's criticism of Weber can be reduced to one denominator: the formal freedom which the rationality of formal law expresses has no normative force, taken by itself, and therefore cannot be used as legitimation for law. The legitimating force Weber has in mind is derived from a substantive sense of freedom and equality: the freedom and equality awarded to real individuals by conceiving these as legal subjects. These values must explicitly be the moral telos.

It can now be concluded that Habermas's criticism of Weber need not imply that subjective freedom and equality are eliminated. Habermas replaces the formal juridical sense of freedom and equality with freedom and equality in a moral sense.

On a juridical level, it was not possible to link freedom and equality to morality without damaging subjective freedom: it would imply an injunction to fill in subjective freedom in a particular way. This, however, does not hold for freedom and equality in a substantivally moral sense. Freedom and equality are now taken to mean not only the freedom and equality of autonomous individuals, i.e. individuals conscious of this freedom and equality, but also of moral individuals, who know they should realize their freedom and equality. This moral level must be called truly substantial, because, though considering individuals as autonomous moral subjects, it does not preclude that the moral commandment has a formal character: it states that individuals have to realize their freedom and equality. What this means with respect to content remains undefined. Therefore, subjective freedom is not forfeited.

This result immediately raises two new questions. How should we conceive of the moral sense of freedom and equality? And how is it related to the juridical sense of freedom and morality? It is clear that Habermas does not accept Weber's separation of law and morality. Law derives its legitimacy from morality. Yet Habermas does not allow law and morality to coincide either, because that would mean relinquishing the freedom and equality of the modern subject. The "complementary relationship" between law and morality that Habermas has in mind conflicts with the Kantian conception, which puts morality hierarchically above law. His argumentation in favor of this view will be discussed in the next section.

2 Communicative rationality as a consequence of Habermas's criticism of the kantian conception of morality

Habermas could join Kant in order to conceptualize the moral sense of freedom and equality. His position is perfectly in line with the demands Kant makes of the moral subject. According to Kant, the moral subject makes his own freedom into a telos. It is a freedom that aspires to fulfilling itself because of what is implied in the concept of freedom. The Kantian moral subject is autonomous, relating to himself. Moreover,

he is bound to a formal commandment. He is forced to strive for his freedom, without thereby prescribing certain substantive actions that menace subjective freedom. Nevertheless, Habermas is not satisfied with the Kantian position. His criticism boils down to the contention that Kant does not do justice to the finitude of the (human) moral subject. (R&M, 116) Kant is not sufficiently radical concerning the limits of human morality. This argument is elaborated in two ways. Firstly, the finitude of man manifests itself in his needs. Yet Kant excludes these needs from the moral dimension. Secondly, human insight is limited and true (moral) knowledge can only be obtained in a dialogue with others. Kant, on the other hand, thinks it is possible to gain moral insight by way of individually ("monologically") performed thinking. To overcome these deficiencies in Kant's philosophy, Habermas sought to bind the moral subject in a Kantian sense to the limitations inherent to human finitude: the development of self-awareness by dialogue and a positive relation to human needs. He thinks he can find the solution to this problem in his concept of dialogical (communicative) rationality.

According to this concept, the autonomy of the subject (his freedom and equality) is, as in Kant, based on his power of reasoning. (TWI, 163) This power, however, is now interpreted differently, namely, as the power of speech. Rational subjects are equal because they possess the same power of speech, and they are free because, with the help of this power of speech, they can interpret every possible content. Starting from this concept of rationality, Habermas developed a theory in which moral insights conform to the demands which can be distilled from his criticism of Kant. According to this theory, true moral insights can only be the result of a dialogue. Moreover, this dialogue must satisfy certain conditions. When these conditions are thought through in their consequences, true moral insights also appear to be connected with a certain relation to human needs.

As a criticism of tradition, the legal subject was formalized and disconnected by Weber from morality, community, and material content. Since Weber's subjective freedom has been linked up with formal, legal subjectivity, he disconnects subjective freedom from morality, community and material content. Like Kant, Habermas connects subjective freedom and equality with rationality. Morality, community, and material content are linked to his concept of communicative rationality. Thus, his position can be interpreted as a synthesis of the traditional position and that of Weber.

Externally, it can be schematized as follows:

1. The formal freedom and equality of the subject of speech is connected with morality;
2. Rationality is interpreted as the procedural, communicative rationality of the subject of speech;
3. Legitimacy is connected with communicative rationality;
4. Tradition is mediated by communicative rationality;
5. Modern (subjective) freedom and equality are connected to the power of speech.

In some respects Habermas's communicative rationality resembles that of Kant. Firstly, it is a reason from which a universal moral law can be deduced. Moreover, (judicial) law derives its legitimacy from the moral content of reason. But in Habermas's view, unlike that of Kant, law and morality are not hierarchically related. Law is not a historical manifestation of a divine morality. Law is always the law of a (finite) historical society. This, according to Habermas, can only be comprehended if the relationship between law and morality is understood as complementary. Consequently, the communicative rationality (from which the moral law is deduced) cannot be considered as the "essence" of reality (a reason which manifests itself in the historical process). Also reason and historical reality are related in a "complementary" fashion (*ergänzend*). Habermas elaborates this idea in the relationship between communicative action and the lifeworld. But before the relation morality/law can be discussed, the fundamental relationship between reason and lifeworld should first be explained.

In the *Theory of Communicative Action*, the comprehensive theoretical framework developed by Habermas, freedom and equality between individuals can, as we saw, be understood in the same formal manner as was the case for Weber: the subjects of language have equal possibilities for giving a free (subjective) interpretation of the world they live in. Because of his specific conception of language, which he borrows from Searle, Habermas is able to overcome the interpretation of freedom and equality as externally awarded to individuals. In this conception the speech act forms the basic element of language. Moreover - and this is my point here - the speech act is understood to be a self-reflective act. (ND, 65) The subject of the speech act is such not only to us, but also to himself. He not only has a subjective interpretation of the world, but he also knows this interpretation to be subjective. This makes room for the question on whether the subjective interpretation is also free or, pressing further, the question on what a free interpretation could at all mean. Similar problems play a role in the autonomous moral subject of Kant. The moral subject knows he expresses himself in a subjective act and is able to ask himself whether his subjective act is also a free act. But when is an action free? Kant solves this problem by supposing that the moral subject, as a conscience, is related to a noumenal, divine order. Subsequently, he maintains that a free action must meet two conditions: the objective (intersubjective) condition that the action in question could be performed by anybody and the subjective condition that the moral subject has the certitude of conscience (the moral feeling) that the relative action is free.

Habermas chooses a solution that, in part, runs parallel to this. In his opinion, a free interpretation must again meet two conditions: the objective (intersubjective) condition that the interpretation in question can be shared by everybody, and the subjective condition that the subject of language must also understand that the interpretation is free. (W, 177/178) The essential difference between Kant and Habermas can be seen in the different meaning they attribute to this subjective insight. Habermas replaces the immediate certitude of conscience inspired by a divine

reason with a certitude that is the result of reasonable argumentation. Ultimately, he takes reasonable argumentation to mean the argumentation of all with all (under specific ideal conditions). Thus, divine reason is replaced by a human reason, a reason which, as will be shown, is historical and dialogical.

According to Kant, the moral subject ultimately is subjectively certain of whether a given action is free or not. In his conscience, he is in direct contact with divine reason. It is precisely for that reason that Kant can conclude that the moral subject has his freedom as an absolute telos. With respect to the content, the realization of freedom means responding to the voice of divine reason. Such immediate certitude is rejected by Habermas. Though this refusal in modern thinking is more or less self-evident, it leads to a number of difficult complications in a philosophical sense. When the filling-in of subjective freedom loses its absolute base, why should it still be a moral obligation to strive for freedom? Habermas answers that it is part of the telos of language itself to want a free interpretation. (TdkH I, 387) Even if this is correct, he is only shifting the problem. Man is not only a being endowed with speech, but also, for example, with a body. Why then should he make the telos that is bound to one of his properties (speech), the highest moral norm? Before I can discuss in detail what Habermas has to say about this, I must first consider a second complication.

When free interpretation is made dependent on a consensus that is sustained by a process of argumentation which in principle is endorsed by all, this raises the question why such an argumentation can at all be supposed to exist. What curbs the freedom to arbitrarily interpret something as a being or not being an argument? It is precisely at this point that Habermas reverts to tradition, content, and community.

The subjects of speech are not only free to interpret their world. At the same time they live in a world that has already been interpreted. They already live in a community of language, in a society that is characterized by traditions. Following Husserl here, Habermas speaks of the 'lifeworld'. (DdM, 369). Every lifeworld has its own view of life. A lifeworld borrows its unity from an implicitly given consensus that is shared by its subjects. Hence, Habermas incorporates the concept of traditional society into his theory. This concept is tied, however, to formal freedom and equality in Habermas's sense, though it must be granted that a traditional society does not tolerate a free interpretation of the world in general, nor of the norms that should be valid in that world in particular. Habermas, however, appeals to the historical dynamism leading up to our (postconventional) society, wherein the traditional lifeworld and the formal freedom (of interpretation) no longer exclude each other. Habermas refers to this development as a "process of rationalization". For the sake of the arguments presented here, it is important to take a somewhat closer look at this process of rationalization.

As long as certain norms are valid in a society, it must be assumed that there is a consensus concerning these norms (generally speaking). This consensus applies not only to the fact that some norms are valid, but also consists of the shared consensus that those norms are aptly valid and legitimate. Some historical experiences of

individuals or groups may have led to the partial loss of the legitimacy of hitherto valid norms, so that the existing consensus is lost. The price to be paid for this is the disintegration of society. This can only be avoided if the consensus is repaired in one way or another. That is possible, according to Habermas, when all participants start a discussion about their interpretation of right norms, and succeed in arriving at a shared interpretation. The new consensus need not be related to the norms prevalent in the previous consensus. By means of this discussion, the possibility arises that society, as well as the norms that constitute its binding force, experience a certain evolution. The discussion offers participants an opportunity to incorporate historical learning processes into their normative order. In Habermas's terminology: the reproduction of the lifeworld is mediated by communicative action; (ND, 96) in this way, a dynamic of development is unleashed.

The development mentioned can lead not only to a (neutral) change of traditional relations, but also to an improvement: a rationalization of old relations. This vision is closely linked to Habermas's specific views on language and discussion. An interpretation of reality is hidden in the natural language of the traditional lifeworld. Through language an order is imposed on the world. Language categorizes and discriminates, but it also synthesizes, lending coherence to the very elements it segregates. The structural order introduced by language can be interpreted as an implicit consensus already existing between the subjects that are part of the same language community. In particular, these traditional norms are also part of this implicit consensus. If, in the face of dissensus, a discussion is held in order to restore consensus, it can only succeed if discussion leads to a degree of self-awareness of the rational structure of the language of discussion. In this way Habermas endeavours to make two things clear at the same time. Firstly, he answers the question how a renewed consensus is possible at all: it depends on the continuously rational structure of language. Secondly, Habermas essays clarifying why the social evolution must be looked upon as a process of rationalization. The growing awareness of the rational structure of language can ensue in the institutional reality of the discriminations. He calls this aspect of the rationalization process *Ausdifferenzierung*. An example is the institutionalization of the separation of church and state, of religion and art, philosophy and science, family and work. The second aspect of the process of rationalization is referred to by Habermas as formalization. Formalization takes place when the discussion that is necessary to reproduce a certain institution itself adopts institutional forms. Examples of this are the legislative power, which reproduces itself by means of a discussion in parliament, or institutionalized science, which reproduces itself by means of discussions in professional magazines and at conferences. With this formalization the process of rationalization reaches completion. It has been explicitly stated that the existing institutions owe their legitimacy not only to form (as a particular institution among other institutions), but also to content, to a free interpretation of all participants.

Habermas's thinking has now been taken far enough in order for the remaining question to be answered. Why should the telos of language, the striving after a free interpretation ("to common understanding" as Habermas would say) of reality, be a moral obligation? It was shown that communicative action depends on the lifeworld. Communicative action and the lifeworld presuppose one another. As the telos of speech (striving after shared understanding) is not possible without the consensus already implicitly given in the lifeworld, so the telos of the lifeworld (reproduction) is not possible without communicative action in which the lost consensus can be regained. Communicative rationality is internally bound up with a finite, historical dimension. The telos of speech and the telos of the lifeworld presuppose one another. Consequently, nobody who is actually alive and thus dependent on the reproduction of the lifeworld can escape from the telos of speech without contradicting himself: communicative action is functional for the reproduction of the lifeworld.

3 Moral action

Insofar as communicative action is functional for the reproduction of the lifeworld, it regulates action and is therefore practical. This does not mean, however, that communicative rationality is simply a moral reason. Habermas emphasizes that the ethics of communicative rationality (discourse ethics) cannot be related to all forms of normative action.

Moral action is related to norms that embody "generalizable interests". (W, 172) What exactly does Habermas mean by that? In opposing the individual telos, Habermas does not have in mind a general interest, the general telos of society. The interests referred to here here are those that every individual can have for himself and that are generalizable because everyone in a specific lifeworld can share them without this leading to contradictions.

"Generalizable interests", interpreted in this way, clarify how Habermas takes up the moral question. If I ask myself: "Is this action right?", I must check in discussion with others what the consequences of this action are for "generalizable" interests, to then furnish reasonable arguments in support of why these consequences are or are not acceptable. This argumentation can result in true (reasonable) consensus, because it is regulated by the rational structure of the language in which the discussion takes place. This structure determines what can apply at all as a reasonable argument. The language of discussion, however, is a specific language that belongs to a specific speech and cultural community. Therefore, the rational structure of a language corresponds to a specific tradition in which the generalizable interests have already been interpreted within the coherence of a general telos belonging to the society in question. Every real society has its own tradition, and therefore also its own idea of what is a "good life", i.e. of the telos of the society. That means that the "free" interpretation of right action that is developed in discussion must be relativized. This interpretation can be called free, because it relies on reasonable arguments. The

reasonableness of these arguments, however, is relative; it relies on the structural order of a specific language community.

The problems described here are recognized by Habermas. That is why he maintains that the envisaged consensus actually is rational only when it is not bound to a specific language of discussion. The partners in the discussion must be able to change freely from one language of discussion to the other. Habermas also identifies this position as the "moral point of view". (ZBM, 295) A moral discussion must be performed by subjects that oppose each other symmetrically, that are totally interchangeable, and therefore not bound to a specific language of discussion. (W,177). But what kind of subjects are they? Are they not purely constructed, abstract subjects? In a certain sense, yes. A discussion that is held from the moral point of view is conducted in what Habermas calls an "ideal speech situation" (W,174) In his view, the term "ideal" has the positive connotation that consensus can be reached only under those conditions that are really rational, as well as the negative connotation that an abstraction is at issue here. The subjects of the ideal speech situation are abstract subjects. They have abstracted from the individual telos of their life histories (and for that reason are not subjected to "internal constraint") and from the general telos of the society they live in (and for that reason are not subjected to "external constraint"). Here, subjects are interpreted purely as the free and equal powers of language that allow the interpretation of all possible contents, in all possible languages of discussion. As a construction that excludes all factors that obstruct rational argumentation, the ideal speech situation, in Habermas's view, forms the condition of argumentation in general. This conclusion is not self-evident. The ideal speech situation is abstracted from precisely those factors that oppose argumentation in real situations. How, then, can the ideal speech situation be a right condition for argumentation in general, and consequently, also for all real argumentation? Habermas recognizes this problem, and concedes that the ideal speech situation cannot ever be real, but also maintains that whoever argues must - counterfactually - assume that the conditions of an ideal speech situation are satisfied. (W,181) Otherwise, it becomes impossible to take an argument as argument (and not as a hidden attempt to exercise power). Habermas believes that the exercise of factual power can be compensated for by institutionalizing processes of argumentation (W,179). Modern science can be mentioned as an example. The institutionalized scientific discussion has led to advances in knowledge, despite the fact that scientists are also driven by numerous greater and lesser interests that do not coincide with the scientific ideal.

At this point it is best to leave the problematic status of ideal speech situation and concentrate on the important conclusions Habermas thinks can be deduced from its status as a precondition of argumentation in general. Habermas thinks it is possible to deduce from it, by analogy with Kant's categorial imperative (M&kH, 73), a universal moral principle (U). (M&kH, 103) He formulates >U< as follows: "Every valid norm has to fulfill the condition that all those concerned can accept the

consequences and the side effects its universal observance can be anticipated to have for the satisfaction of everyone's interests (and that these consequences are preferred to those of known alternative possibilities for regulation)". (EzD, 134) We have seen which criteria the right action must meet: the predictable consequences and side-effects of this action must be acceptable to all. Whether or not this is the case can be made clear by an argued consensus. Having determined the preconditions of argumentation in general, it can be added that the symmetrical relation of partners participating in the argumentation must also be taken in account. The consensus must also apply if all were to perform the act in question, and the participants must not be affected by power relations that disturb the symmetry. In this way, Habermas constructs a version of the categorial imperative that is as symmetrical as that of Kant, but is not abstracted from material contents.

Within the structure of Habermas's theory, the introduction of >U< properly speaking is a remarkable step. Basically, his theory is a synthesis of thinking along the lines of Kant and Weber and the traditional approach. With >U<, this traditional moment is for the most part excluded once again. The individual telos and the telos of society as a whole disappear. This leads to two important problems. In the first place, it is no longer clear how Habermas can assign a moral binding force to >U< on the basis of his own reasoning. For he had earlier linked the morally binding force of discourse ethics to the reproduction of the same lifeworld that he now excludes. In the second place, it is not clear which argumentation within Habermas's framework can still have any meaning at all when it is disconnected from a defined language of discussion.

4 The relation between moral action and the system of rights

The moral point of view leads to the construction of general abstract persons. Separated from concrete reality, they seem to oppose one another like isolated atomistic individuals. This abstraction provides room for subjective freedom. Actual subjective freedom, however, once again dissolves this abstraction. Real action interferes with the actions of others. For that reason the real acting of all people demands that the subjectively chosen contents of action be in harmony. But this, in turn, makes demands on harmony which seem to be opposed to subjective freedom. Similar problems appear to play a role in the speech act as conceived by Habermas. The interpretation that has been chosen in subjective freedom can only realize itself as a true interpretation when it is in harmony with the interpretation of others. That harmony only is possible because of the rational structure of a specific language, which is tied to a specific language community. Thus, the freedom of interpretation is damaged. Moral freedom, as conceived by Habermas, does not exist alongside general ethical action in which the general telos of society is realized, but is inherent to it. Habermas was confronted with the problem of how to deal with the reality of normative action without binding this indirectly to the closeness of ethical action in a

real society. The meaning of Habermas's theory is dependent on its power to make understandable, without contradictions, the cohesion between moral and ethical action. What does Habermas himself say about this cohesion?

Quite rightly, he remarks that the problem does not play a role in traditional societies. (ZBM, 315) In these, subjects are tied to an objective social role which they may or may not fulfill adequately. It is definitively established, however, that the objective role forms part of the concrete totality of society. This situation changes when subjective freedom enters the scene. The measure for action is no longer an existing objective role, but a universal criterion, which is independent of a specific givenness. The implication is, according to Habermas, that a distinction must be made in the future between the foundation and the application of normative action. (ZBM, 316) Even if it has been established by universal proof that a certain type of action is morally right, then this does not make it at all clear how people should act in a concrete context. To produce the universal proof, the action must be separated from all specific contexts. Therefore, it is not clear a priori which of the many possible right acts are relevant in a certain context, or whether a certain possibly right act may be generally performed in a certain context. Yet, for a discourse ethics to bear any relation to reality, there must be a relation between context-bound normative action (ethical action) and universal normative action (moral action).

Habermas calls the universal moral law >U< an "internal constitution" (*innere Verfassung*). The relation between moral knowledge and real action remains virtual. >U< orders one to regulate real action in conformity with the moral law. But >U< remains a commandment which, like the moral "ought", opposes reality. Of itself the moral order cannot determine real action. Not only because the internalized moral law as conscience remains too weak, but also because in real situations it is often difficult to establish what the moral law orders one to do (F&G, 147). Therefore, according to Habermas, the morality of reason must be compensated by law. (F&G, 146) He determines law as the "external constitution". Law is no internal legislation, but a real existing corpus of law, which is ordered into a unity, as a *system of rights*. The nature of law and its order as a system of rights shall be examined hereafter.

Law and morality, according to Habermas, are related to the same problem. Both question how "interpersonal relations can be ordered legitimately" (F&G, 138) In each case, however, the question is situated at a different level. Morality is active in the field of cultural knowledge and is related to possible actions, while law concerns the institutional level where real actions are executed. (F&G, 146) In the Habermasian view, this does not mean that the legal community realizes morality. Although it presupposes morality, it has its own, independent reality. The legal community cannot be deduced from morality. Here Habermas speaks of a complementary relation (F&G, 143) or relation of completion. (F&G, 135, 137)

In a traditional society (in which no independent legal order has been developed) the institutional actions of the legal subjects do not coincide with the real actions of

"natural" subjects (real individuals). At a certain level, the legal order substitutes the relations arising from tradition for legal relations derived from self-awareness. The difference between the real individual and its role as a legal subject then becomes apparent. This difference is responsible for the objectivity of law. The legal subjects are liberated from an immediate moral burden and are thus able to relate to each other objectively. The relationship between legal subjects is one in which the subjects are no longer obliged to ask themselves whether an action is right or wrong, but only whether it is in accordance with the prevailing law. Moreover, maintaining the legal order is not a task of the legal subjects themselves, but of the sovereign legal power, which in the last resort forces the maintenance of the law by violence.

A legal order does not need to be rational. It cannot be excluded that freedom and equality of the individuals are not respected. This changes when law is interwoven with the discourse principle of communicative rationality. (F&G, 154) The discourse principle functions within the context of law as a "principle of democracy", which guarantees legal equality and subjective freedom. In the last resort, this fundamental principle of democracy forms the reasonable basis of *human rights*.

The subjective freedom allowed by law can oppose the rights of the community. The individual freedom everybody has for himself need not imply a harmonious totality. Contract philosophers such as Kant and Rousseau did not, according to Habermas, succeed in solving this problem in a satisfactory fashion. There is an insufficient correspondence between the sovereignty of the people and subjective freedom, the rights of the (democratic) community, and the individual rights of man. Habermas claims that this dilemma is resolved in his conception of communicative rationality. This conception enables one to understand the sovereignty of the people from the perspective of a discourse theory: in principle, the content of the general will is the outcome of a discussion between all associates under law. Because in this discussion the individual input of all is weighed in a reasonable (argumentative) fashion, the general will no longer opposes the individual will of the legal subjects. The principle of democracy (the medium of rights as such, which is interwoven with the discourse principle), supplies a criterion for the rational reconstruction of law. Existing systems of rights can be ordered according to the degree to which they express the principle of democracy. (F&G, 155)

Habermas does not execute this rational reconstruction. But he does indicate what can be the result of the reconstruction: the determination of a "system of rights" (expressing categories of rights). (F&G, 159) The "system of rights" is deduced from historically real constitutions and provides the determinations to which all democratic constitutions must necessarily conform. The specific democratic constitutions can, therefore, be understood as the specific (historical) interpretation of this "system of rights", accomodated to a certain lifeworld. (F&G, 193, 163)

Moreover, Habermas actually fills in this "system of rights" when he initially deduces three categories of rights from the application of the discourse principle to the medium of rights as such. (F&G, 156)

(1)"Grundrechte, die sich aus der politisch autonomen Ausgestaltung des *Rechts auf das größtmögliche Maß gleicher subjektiver Handlungsfreiheiten* ergeben."
(2)"Grundrechte, die sich aus der politisch autonomen Ausgestaltung des *Status eines Mitgliedes* in einer freiwilligen Assoziation von Rechtsgenossen ergeben."
(3)"Grundrechte, die sich unmittelbar aus der *Einklagbarkeit* von Rechten und der politisch autonomen Ausgestaltung des individuellen *Rechtsschutzes* ergeben." (F&G, 155/156)

It remains unclear how this "reconstruction" of the "logische Genese von Rechten" (F&G, 154/155) succeeds in maintaining the complementary relation between law and morality. Indeed, this relation is hierarchical, rather than complementary. The aforementioned fundamental rights can be deduced from the discourse principle without the help of a rational reconstruction.
(1) The discourse principle assumes free and equal subjects of knowledge: they have equal freedom to interpret reality. This equal freedom also applies to the interpretation of the content of their will. Since action means realizing a content of will, it can be concluded that every system of rights which is in accordance with the discourse principle must necessarily guarantee as much freedom of subjective action as possible. This means the guarantee of that degree of subjective freedom of action which can be granted to all without contradiction.
(2) General subjective freedom of action only is possible if the subjective contents of action in harmony with each other. From this it can be concluded that the system of rights which is in accordance with the discourse principle must necessarily guarantee that the legal subjects give real shape to their mutual harmony: they must belong to a real legal community (in which the "good life" is interpreted in a certain way).
(3) According to the discourse principle, only those actions can be right which are sustained by rational consensus (i.e., consensus under ideal conditions). Right actions can be motivated by rational arguments. From this it follows that any system of rights which is in accordance with the discourse principle can only accept as legal those actions which, according to the rationality of the prevailing law, can be argued explicitly to be such. In other words, law must be reflexive: it must explicitly guarantee that the reality of law is congruent with its rationality. Law must guarantee that all people can exert their rights (*Rechtsschutz*) and that they all have insight into its legitimate character by making legal precedures possible (*Anklagbarkeit*) if this insight is lacking (on subjective or objective grounds).

These fundamental rights remain within the Kantian framework and only express the formal demands to which all systems of rights must conform in order to do justice to the formal freedom and equality of the discourse principle. This is not the case with the fourth cluster of fundamental rights that Habermas formulates:
(4) "Grundrechte auf die chancengleiche Teilnahme an Prozessen der Meinungs- und Willensbildung, worin Bürger ihre *politische Autonomie* ausüben und wodurch sie legitimes Recht setzen." (F&G, 156)

These fundamental rights seem to be more substantive; they make it possible to differentiate between a legitimate and an illegitimate system of rights. This fosters the expectation that a rational recontruction might be at stake for the determination of the content of this differentiation. The differentation, however, is interpreted procedurally; the legal order is considered to be legitimate if legislation is the result of a rational consensus. Again, the fundamental rights in question can simply be deduced from the discourse principle.

The discourse principle is hierarchically related to the system of rights. There is no question of a complementary relation. Rational reconstruction is redundant. In the system of rights only those universal demands are formulated to which any system of rights must conform in view of validly fulfilling the discourse principle. The complementary relation comes into play at the level of the relation between the system of rights and a real legal order: insofar as the real legal order can be conceived to be interpret (and concretize) the system of rights in the context of a specific (historical) lifeworld. This interpretation is consistent with the *Theory of Communicative Action*, in which Habermas considers the relation between communicative action and lifeworld to be complementary. (E, 339)

The interpretation of the system of rights developed here has implications for the relation "Faktizität/Geltung", as well as for the relationship between law and morality. If the system of rights can be deduced from the discourse principle (hence is not the outcome of a rational reconstruction), it does not constitute the point of intersection of *Faktizität* and *Geltung*. Rather, this point of intersection is shaped by the real constitution as the factual interpretation (made in a historically given lifeword) of the universal system of rights. Moreover, law and morality are no longer opposed to each other (as a real and ideal system of action). The real constitution is a synthesis of law and morality. According to the fundamental rights mentioned under point (4), the interpretation of the system of rights in the real constitution is made under the condition of equal opportunity for all to participate in the necessary formation of opinion and will. This does justice to the moral point of view. This (universal) moral point of view has at the same time, however, already been given a (provisional) determination in a real community of law. The real constitution has expressed real consensus all along, which is possible on the basis of a (historically given) shared lifeworld.

5 The status of the system of rights

As the point of intersection of "Faktizität" and "Geltung", the system of rights is the central conception within Habermas's theory of law (formulated in *Faktizität und Geltung*). Using this concept he attempts to bridge the gap between universal morality and the historical lifeworld. In his earlier writings, this problem was not adequately solved. In order to arrive at the determination of universal norms, Habermas had to presuppose an ideal community of communication. Only under conditions of the ideal community of communication could consensus about norms be rational. Only rational norms could be universal. The ideality of the community, however, was based on its openness to the whole of mankind, present, past, and future. But how can consensus ever be reached under the conditions of this openness? What is the significance of a community that essentially has no boundaries? Can universal justice, as Habermas suggested, be complementary to solidarity? (ZBM, 311) Is there any point in feeling solidarity with *possibly* existing human beings? Must not every consensus necessarily be related to a real community?

In Habermas's view the ideal community cannot be an idealization of the real community, because that would undermine its universality. Nor can it be the *essence* of the real community. An eternal essence would imply metaphysics. Consequently, Habermas does not succeed in adequately determining the relationship between the real and the ideal community. The introduction of the system of rights envisages overcoming these difficulties. On the one hand, the system of rights as a rational *reconstruction* is not independent of history, without being only an abstraction of a *specific*, historical community. On the other hand, the system of rights as a *rational* reconstruction has a universal status, without being metaphysical.

The fundamental rights determined by the system of rights seem to have the same status as the first principles of justice in John Rawls' *Theory of Justice*. These first principles, are, likewise, neither metaphysical nor empirical but something in between. Moreover, these principles are deduced proceduraly from free and equal moral persons (just as the discourse principle assumes free and equal linguistic persons).

Like the fundamental rights (Habermas) the principles of justice, according to Rawls, cannot simply be deduced theoretically from the freedom and equality of persons. They must be chosen by the persons themselves, according to a specific procedure. Nevertheless, in his theory Rawls anticipates the formulation of the principles, just as Habermas anticipates the formulation of the fundamental rights, without actually carrying out the rational reconstruction. In my opinion, this is in both cases an indication that the rights/principles are best deduced theoretically from the concept of free and equal persons.

There is another reason why the comparison of Habermas's theory with that of Rawls is useful. The procedure in Rawls' theory includes the steps by which the abstract principles are translated into more substantive stages. After the so-called

'original position' (1) in which the first principles of justice are chosen, Rawls distinguishes the stage of constitutional convention (2) the stage of legislation (3), and the most substantive stage (4) in which rules are applied to particular cases by judges and administrators, and are followed by citizens generally. (*Theory of Justice,* 199). Habermas's theory offers stages analogous to all of these stages, not least the third and fourth stages, which reappear as forms of the *legal discourse*.

The legal discourse is an institutionalized practical discourse, in which a certain synthesis between moral and ethical action is reached. The legal discourse is a discourse of application (EzD, 138). This application plays its role on two levels. (EzD, 125). Firstly, the legislator determines the rights and duties of the citizens on the level of legislation. Ideally, this occurs in a parliament that, on the basis of reasonable argumentation, strives to reach the greatest possible consensus. (M&kH, 102). Such a consensus is possible only insofar as an appeal is made to a shared lifeworld (E, 369), i.e. law must express the ethical context in a certain fashion. But law is not simply an explication of traditional relations. The constitution of law is mediated by reasonable argumentation and, therefore, conforms to universal moral standards. Moreover, the legal discourse of legislators meets the demands of practical life. The discussion does not go on endlessly but is bound to certain rules, which in the long run lead a to decision and eventually a vote.

Secondly, the legal discourse is a discourse of application at the level of jurisdiction. The judge refers to concrete cases. He determines how the concrete case must be interpreted in juridical terms, which of the existing laws is relevant in the actual case, and pronounces his judgement. What is important here is that in Habermas's opinion the activities of the judge are also mediated by practical discourse (the role of expert witnesses, jurisprudence, etc.).

In a discussion of the legal discourse, Habermas tentatively considers whether a differentiation should be made between "primary" and "secondary" legal norms. (R, 130) Although the meaning of his differentiation is not explained in detail, it can be supposed that this differentation is related to the juridical levels that are being distinguished. The level of legislation seems to correspond to "primary legal norms" ("being relevant for the constitution of legal subjectivity in a manner similar to social norms which intervene in the socialization process"), while the level of jurisdiction seems to correspond to the "secondary legal norms" (which "merely delineate the range of options for already constituted legal subjects").

Based on this interpretation, it can be concluded that, for Habermas, law creates the presuppositions under which moral action can actually take place in society. In contrast to Habermas's more recent view, law realizes moral action. The moral "ought" becomes the real "can" because law guarantees a real context that is in accordance with moral demands. This leads us back to a topic that was discussed earlier, namely, the problem of the ideal community. Clearly, it is in this fashion that the parallel with the first and second stage can be worked out.

Initially, the ideal community, as the ideal context of moral action, can also be interpreted as the ideal legal community. Furthermore, the problem of the relation between the ideal and the real community returns as the problem of the relation between the ideal and the real legal community. The ideal community cannot be interpreted as an idealization of the real community, for that would annihilate subjective freedom. This becomes clearer when this relation has to be formulated in terms of the legal community; law regulates the real context, and not the other way around. If this state of affairs is due to law, this has consequences for what Habermas calls the "legal norms". In effect, it can then be argued that, under these circumstances, a third category - the "ideal legal norms" - must be added to the cited "primary" and "secondary" legal norms. These are the norms Habermas has recently formulated as the fundamental rights of the system of rights.

The problems concerning the determination of the ideal community (of law) are directly related to the way in which Habermas determines "rationality". The rational subject is primarily a subject of language; the structural order of reality is derived from language. At the same time, a certain relationship holds between the subject and language. The subject, for example, can switch from one language of discussion to another. It is a difficulty that, in the end, Habermas is able to conceptualize this relationship between the subject and the language. How can language be thought of as such, if one remains forever ensnared in the cognitive schemes of a certain language? On the other hand, Habermas is ambiguous. Though the categorial order of reality is identified as being the order of the schemes of language, Habermas still conceives of an order that precedes all language. "The general possible equal originally structure of those relations of recognition, which make the self-understanding as a person, as that as a member of a community in general, is presupposed in communicative action and remains preserved in the preconditions of communication by moral argumentation. It is this structure that allows us to judge something from a moral point of view." (EzD, 152) The moral point of view is a universal point of view and, therefore, cannot be bound to any specific structure of language. It is the same universality that is encountered in the freedom of the subjects of language which are bound to the telos of language, the striving for a common understanding on the basis of rational argumentation. Every speech act is bound to the three-world structure: a subjective, an objective and an intersubjective world. According to Habermas, every speech act can implicitly or explicitly be analyzed as the speech act of a subject that tries to make himself understood to others with respect to something in reality. (ND, 77) Apparently, these are fundamental, categorial structures which cannot be attributed to any specific language. The same is true of the principle of Universalization >U< that is explicitly presented by Habermas as a universal ethical law. But this also means that the ideal community that corresponds to >U< has an internal structure with the same universal status. Supposedly, the "ideal legal norms" can be deduced from this structure as the system of rights.

To speak of an ideal community is somehow paradoxical. In a community things shared are set apart from those that are not. But in the ideal community, it is this demarcation which must be broken down. The ideal community is universal. The problematic status of this universality becomes even more apparent if one considers the definition of "solidarity" that Habermas links to it: solidarity is concerned with "the good of the associates, who are allied in an intersubjectively shared lifeform". It is this common "good" that constitutes a community. This "good" refers to a certain content, which is separate from other contents, other possible conceptions of the "good". A community, by definition, exists next to communities and, in that sense, is not universal. It is, perhaps, for this reason that Habermas remarks: "But these normative obligations (i.e., the ideas of justice and solidarity, p.c.) do not on behalf of themselves go beyond the boundaries of a concrete lifeworld ... " (EzD, 71)

How, then, does the ideal community derive its universal status? Habermas seems to provide an answer to this question when he goes on to say: "These limitations can only be overcome in discourses, as far as these are institutionalized in modern societies. Argumentations do not by themselves exceed particular lifeworlds". Initially this answer may seem strange. Why should the universality of the ideal community be bound to the institutions of modern society? Does not this historical bond simply damage its ideality? On closer inspection, this remark clarifies the actual status of the ideal community for Habermas. By binding it to historical institutions, Habermas tries to avoid taking up a metaphysical position. The ideal community does not form a second, supernatural realm that can be compared to the noumenal world of Kant. The solidarity on which discourse ethics relies "remains tied within the boundaries of earthly justice". (EzD, 73) Firstly, the community is an ideal one as a counterfactual presupposition of real communicative action. Secondly, the ideal community is not the precondition for communicative action in general, but for the institution in which communicative action as such acquired its form: discourse. In Habermas's view, the reproduction of all forms of society is mediated by communicative action which is always bound to (counterfactual) pragmatic presuppositions. But only on the - postconventional - level of modern society can communicative action, in the form of discourse, discuss society as such. As long as this is not the case, it suffices to characterize the presuppositions of communicative action as idealizations of existing relations: as a reality that is rid of power influences. For in that case communicative action can be regulated by the cognitive schemes of the prevailing language of discussion. But if society as such is under discussion, it must be possible to make a transition to another language of discussion with other cognitive schemes. In other words, the ideal community must be presupposed in the full sense of the word: an ideal community that is not considered as idealizing a certain society, but as idealizing every possible historical society.

Given this interpretation of the ideal community (of law), it is no longer clear why Habermas speaks about the "counterfactual anticipation" of this community. The ideal community represents the ideal basic structure of every community (of law),

and in that sense has always been real. What Habermas applied to discourse ethics also applies to the ideal community; "Considered are those aspects of a "good life", which in general from the point of view of communicative socializing as such, can be discerned from the concrete totalities of actual particular lifeforms and lifehistories." (EzD, 73) The ideality of the ideal community lies in its formal status. It is real, however, because every real community of law realizes it in a more or less adequate form. It is essential for the ideal community to manifest itselfin one way or another; for if it did not, it would not exist at all.

As a result of the previous considerations, I propose to interpret the ideal community of communication as the ideal legal community. The ideal legal community, in turn, has to be defined by the formal conditions of law to which all free and equal communities must conform. The ideal community coincides with a universal system of rights. These rights are identical with the first principles of justice which can be deduced from the universal "original position": the moral point of view which is based on universal, free and equal persons. Only in the second stage (that of legislation) can the system of rights be filled in historically. A constitution is the product of a community of language which has interpreted the system of rights in the light of its specific historical lifeworld.

6 Abstract

Within Habermas's Theory, the Systems of Rights forms the most abstract point of intersection between *Faktizität* and *Geltung*. This article argues that the system of rights can be deduced from the discourse theoretical conception of freedom and equality. There is no need for a rational reconstruction of this system. The point of intersection of *Faktizität* and *Geltung* must rather be considered as the interpretation of the system of rights in a specific, historical constitution.

7 Literature

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